Supreme Court, U.S.
FILED
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(3)

No. 93-1644

In The

SUPREME COURT of the UNITED STATES

October Term, 1994

JAMES ROBERT BURCHARD and JUNE P. BURCHARD,
Petitioners,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner's Reply Brief

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18 pp

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On Petition for Writ of Certiorari
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For the Ninth Circuit

Petitioner's Reply Brief

The Respondent's arguments highlight why this Court should grant the Petition for a Writ of Certiorari. The granting of the Petition would clarify and resolve the following questions to-wit:

1. Does a copy of a Notice of Appeal properly addressed, a certified mail receipt and a signed certified mail return receipt postcard constitute sufficient evidence to create a, . . . **rebuttable presumption** OR **a nonrebuttable presumption** . . ., that the Notice of Appeal was delivered to the Clerk of the Court?

2. If such evidence creates a **rebuttable presumption**, what is the quality and quantity of evidence that is needed to rebut the presumption of delivery?

I. A COPY OF A PROPERLY ADDRESSED LETTER, A CERTIFIED MAIL RECEIPT AND A SIGNED RETURN RECEIPT POSTCARD IS SUFFICIENT EVIDENCE TO CREATE A PRESUMPTION THAT THE LETTER WAS RECEIVED BY THE CLERK OF THE COURT.

Respondent's statement (Opp. 4-5) that "Neither Petitioner's new factual assertions nor the certified mail receipts with which Petitioners have now come forward establish that Petitioner's notice of appeal was timely filed" is unfounded in fact and unsupported by reasoned analysis.

In reply to Respondent's interpretation of the operative facts that establish that the Petitioners filed a timely Notice of Appeal, consider the following:

On **April 12, 1993**, the Petitioners discovered that their Notice of Appeal had not been received by the Clerk of the 9th Court of Appeals in San Francisco or by the Clerk of the District Court in Seattle (Pet. App. 9a).

On **April 12, 1993**, the Petitioners

retyped their Notice of Appeal (Pet. App. 1a).

On **April 13, 1993**, the Petitioners sent their Notice of Appeal (Pet. App. 1a) to the Clerk of the District Court in Seattle by certified mail (Pet. App. 2a & 3a).

On **April 14, 1993**, the Clerk of the District Court in Seattle received the Notice of Appeal. The certified mail return receipt shows that an employee of the Office of the Clerk of the District Court in Seattle signed for the Notice of Appeal on April 14, 1993 (Pet. App. 2a & 3a).

> **NOTE: Nowhere in Respondent's brief in opposition (Opp. 4-5) does the Solicitor General deny that an employee of the Clerk of the District Court in Seattle signed the certified mail return receipt on April 14, 1993 (Pet. App. 2a & 3a).**

On **April 16, 1993**, the Petitioners sent their Notice of Appeal (Pet. App. 1a) to the Clerk of the 9th Court of Appeals in San Francisco by certified mail (Pet. App. 4a & 5a).

On **April 19, 1993**, the Clerk of the 9th Court of Appeals in San Francisco received the Notice of Appeal. The certified mail return receipt shows that it was stamped on April 19, 1993, with the official stamp of Cathy A. Catterson, Clerk of U.S. Court of Appeals in San Francisco (Pet. App. 4 & 5).

> **NOTE: Nowhere in Respondent's Brief in Opposition (Opp. 4-5) does the Solicitor General deny that the certified mail return receipt was stamped on April 19, 1993, with the official stamp of**

Cathy A. Catterson, Clerk of the U.S. Court of Appeals in San *Francisco* (Pet. App. 4 & 5).

The last day to file the Notice of Appeal was **April 23, 1993**, Fed. R. App. P. 4 (a) (1).

In Hagner v. United States, 285 U.S. 427 (1932), this Court stated at page 430:

> "The rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed."

To the same effect see Rosenthal v. Walker, 111 U.S. 185 (1884).

Beck v. Somerset Technologies, Inc., 882 F. 2d 993 (5th Cir. 1989), is a product liability action with Beck as the injured employee, Somerset as the manufacturer of the product and Crown as the purchaser of the product and Beck's employer.

The Court, citing Hagner v. United States (supra), stated at page 996:

> "Thus, the question becomes whether or not Somerset mailed the letter to Crown. If such evidence is presented and not rebutted then it may be presumed that Crown received the warning. The record contains a copy of the properly addressed letter, a certified mail receipt and signed return post cards. Accordingly, we hold that there was sufficient evidence to create a presumption that the letter was received by Crown in the due course of the mail. Thus, the burden of producing evidence of non-delivery shifted to Beck."

There is sufficient evidence in the record of this case, . . . Pet. App. 1a - 5a . . ., to create a presumption that the Notice of Appeal was timely received by the Clerk of District Court in Seattle on April 14, 1993, and by the Clerk of the 9th Court of Appeals on April 19, 1993.

II. **WHILE THE PRESUMPTION OF DELIVERY IS A REBUTTABLE ONE IT IS VERY STRONG PRESUMPTION AND CAN ONLY BE REBUTTED BY SPECIFIC FACTS AND NOT BY INVOKING ANOTHER PRESUMPTION.**

In Roush v. Kartridge, 838 F. Supp. 1328 (S.D. Iowa 1993), the court cited at page 1335:

> "'While the presumption is a rebuttable one it is a very strong presumption and can only be rebutted by specific facts and not by invoking another presumption.' Arkansas Motor Coaches, 198 F. 2d at 191; see also Meckel v. Continental Resources Co., 758 F. 2d 811, 817 (2d Cir. 1985) (holding that under New York law that mere denial of receipt is insufficient to rebut the presumption)."

In the creation of their presumption of delivery, the Petitioners have provided independent third party written evidence from the United States Postal Service that mail from the Petitioners was delivered to the Clerk of the District Court in Seattle on April 14, 1993, and to the Clerk of the 9th Court of Appeals in San Francisco on April 19, 1993.

The Respondent states, at page 4 of his Brief in Opposition, as follows:

> "In support of these claims,

> petitioners have produced certified mail receipts indicating that the district court and the court of appeals received mail from petitioners on April 14 and April 19, respectively Pet. App. 2a-5a. However these receipts do not indicate what it was that the petitioners sent to the district court and the court of appeals.

Anyone who believes ... that the Petitioner sent an empty envelope by certified mail to the Clerk of the District Court in Seattle on April 13, 1993, **OR** that the Petitioner forgot to put the Notice of Appeal in the envelope he sent certified mail to the Clerk of the 9th Court of Appeals in San Francisco on April 16, 1993, **believes in Santa Claus, the Easter Bunny, and the Tooth Fairy.**

A concise compendium of the evidence of non-delivery produced by the Respondent to rebut Petitioner's presumption of receipt follows:

1. The Respondent, at Opp. 4, disputes " . . . what it was that Petitioners sent to the district court and the court of appeals." The mere denial is insufficient to rebut the presumption. Meckel v. Continental Resources Co., 758 F. 2d 811, 817 (2nd Cir. 1985).

> Query: Why didn't the Solicitor General prove what was in the envelopes? Surely some record is kept of incoming certified mail by a deputy clerk at both the District Court and the Court of Appeals. **For instance:** The signed certified mail receipt (Pet. App. 2 & 3) shows that mail was received from the Petitioner

by the Clerk of the District Court at Seattle on April 14, 1993. Each incoming piece of mail is stamped with the Clerk's dated receiving stamp. Surely, it is possible to determine what mail came in a particular day, the description of each type of mail that came in on that particular day, and the sender.

2. Nowhere in Respondent's Brief in Opposition (Opp. 4-5) does the Solicitor General deny that an employee of the Clerk of the District Court in Seattle signed the certified mail return receipt on April 14, 1993 (Pet. App. 2a & 3a).

3. Nowhere in Respondent's Brief in Opposition (Opp. 4-5) does the Solicitor General deny that the certified mail return receipt was stamped on April 19, 1993, with the official stamp of Cathy A. Catterson, Clerk of the U.S. Court of Appeals in San Francisco (Pet. App. 4 & 5).

The Petitioners have provided independent third party written evidence from the United States Postal Service that mail from the Petitioners was delivered to the Clerk of the District Court in Seattle on April 14, 1993, and to the Clerk of the 9th Court of Appeals in San Francisco on April 19, 1993.

What more can the Petitioners do to prove that the Notice of Appeal was timely filed within the purview of Fed. R. App. P. 4 (a) (1)?

III. **CERTIFIED MAIL, RETURN RECEIPT REQUESTED, FURNISHES A SENDER OF MAIL WITH PROOF OF ITS DELIVERY.**

In Reinsurance Co. of America, Inc. v. Administratia, 808 F. 2d 1249 (7th Cir. 1987), the Court stated at page 1253:

> "Certified mail, return receipt requested, . . . is designed . . . to furnish a sender of mail with proof of its delivery, and it is in return for this assurance, . . . that certified mail is more costly."

In Chrysler Motors Corp. v. Schneiderman, 940 F. 2d 911 (3rd Cir. 1991), the Court stated at pages 914 and 915:

> "We also point out that a creditor can protect itself with minimal expense through the use of certified mail with a return receipt requested when filing a proof of claim . . . ."
>
> * * *
>
> "As we have already indicated, Chrysler could have easily at minimal expense used certified mail, return receipt requested."

To the same effect see Taylor v. Freeland & Kronz, 938 F. 2d 420 (3rd Cir. 1991).

On Opp. 5 and on Opp. App. 3a, the Cooneys are mentioned, they run a secretarial service which occasionally does typing for the Petitioners. The Petitioners knew that the Cooneys were going to Seattle on May 13, 1993, so they asked the Cooneys to deliver a check to the Clerk of the U.S. District Court. The Cooneys were not and are not my representatives.

The Petitioner James R. Burchard takes offense at the Solicitor General's specious reflections on his integrity and points out

that he is a member of the Chippewa-Cree tribe of the Turtle Mountain band, a World War II Marine Corps veteran (having been Honorably Discharged on August 22, 1946) and a member of the Church of Latter-Day Saints. He was a Reactor Plant General Foreman (WS-13 Step 5) at the Puget Sound Naval Shipyard in Bremerton, Washington with a security classification of "Secret."

CONCLUSION

WHEREFORE, the Petitioners pray that a Writ of Certiorari be granted to rectify:

1. the misapplication by the Ninth Circuit of this Court's opinions in Houston v. Lack, 487 U.S. 266 (1988) and in Parissi v. Telechron, 349 U.S. 46; and,

2. the misapplication by the Ninth Circuit of Fed. R. App. P. 4 (a) (1).

Respectfully submitted,
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